

ALLEN, SUMMERS, SIMPSON, LILLIE & GRESHAM

A PROFESSIONAL LIMITED LIABILITY COMPANY
ATTORNEYS AND COUNSELORS

RECEIVED

JUL 31 2007

TN Division Of Water
Pollution Control

July 24, 2007

BRINKLEY PLAZA
80 MONROE AVENUE, SUITE 650
MEMPHIS, TENNESSEE 38103-2466

TELEPHONE: (901) 763-4200
FACSIMILE: (901) 684-1768
WEBSITE: www.allensummers.com

ROBERT L. GREEN
RICHARD H. ALLEN, JR.
JAMES B. SUMMERS
JAMES M. SIMPSON
SHAWN R. LILLIE
DARRYL D. GRESHAM
HEATHER W. FLETCHER
KIRK A. CARAWAY
KEVIN W. WASHBURN
JOSEPH M. KOURY
BRENDA R. NELSON

TDEC
Memphis Environmental Field Office
Suite E-645, Perimeter Park
2510 Mt. Moriah Road
Memphis, TN 38115-1520

Paul E. Davis, Director
Division of Water Pollution Control
TN Dept. of Environment and Conservation
6th Floor L& C Annex
401 Church Street
Nashville, TN 37243-1534

RE: Our File No. 26523
TDEC vs. White Contracting, Inc.
Case No: 07-094

Gentlemen:

Please find enclosed a copy of the Appeal of Director's Order and Assessment which we are submitting in connection with the above captioned matter.

Should you have any questions or concerns, please do not hesitate to call.

Very truly yours,

ALLEN, SUMMERS, SIMPSON,
LILLIE & GRESHAM, PLLC



James B. Summers

JBS/bmr

cc: Tommy Sanders, White Contracting, Inc.

STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION

IN THE MATTER OF:

DUNTREATH PARTNERS

AND

WHITE CONTRACTING, INC.,

RESPONDENTS

DIVISION OF WATER
POLLUTION CONTROL

NO. 07-094

RECEIVED

JUL 31 2007

TN Division Of Water
Pollution Control

APPEAL OF DIRECTOR'S ORDER AND ASSESSMENT

COMES NOW Duntreath Partners and White Contracting, Inc., Respondents in the above captioned, and appeal the Director's Order and Assessment ("Director's Order") that was issued by the Director of the Division of Water Pollution and Control on the 25th day of June, 2007.

This Appeal is made pursuant to T.C.A. § 69-3-109, 115.

In support of its Appeal, the Respondents would show as follows:

**COMPLIANCE OF RESPONDENTS WITH
TNCGP AND ASSOCIATED REGULATIONS**

1. That at all times material, and particularly within the time frame set forth within the Director's Order, the Respondent's were operating under appropriate erosion prevention and sediment control measures that had been designed by a professional engineer.
2. Appropriate Notice of Intent, correct fees, and a current SWPPP were supplied to the State of Tennessee as required.
3. No work on the site was started until Respondents received the Notice of Coverage on January 6, 2005.
4. All activities undertaken by Respondents have been in accord with the TNCGP.

5. From the beginning of Phase III of the development, which began in March of 2005, the current site was continuously inspected by Respondents as required by current regulations. Timely Tennessee Construction Storm Water Inspection reports have been prepared in accordance with the NPDES permit 151443 and have been kept on file per instructions of the local TDEC office.

6. The original erosion control design that became part of the SWPPP was modified by the professional engineer retained to draft the civil plans to meet the suggested revisions of the State of Tennessee, through the Division of Water Pollution Control in Shelby County. As noted in the Director's Order, the modified SWPPP that set forth the nature and extent of the planned erosion control for the site was accepted by the State, and presumably was "blessed" by the State, since it was modified to meet the State's demands for additional drawings and details, particularly with respect to the sediment traps that were included in the plans.

PROMPT RESPONSE OF RESPONDENTS TO ADDRESS CITY OF GERMANTOWN CONCERNS

7. Respondents further assert that they have had an excellent working relationship with the Germantown City Engineer's office since the development began, and repairs and adjustments have been made occasionally as requested, as conditions changed. At no time have Respondents ignored or delayed any request by Germantown to modify or repair erosion control on this site, and the receipt of the Director's Order, from which this Appeal is taken, was totally unexpected, in light of the immediate efforts made to address concerns raised by the City of Germantown in connection with this project.

8. Respondents were not provided with a Notice of Violation by the State of Tennessee prior to the issuance of the Director's Order. A Notice of Violation was received from the City of Germantown on April 30, 2007, and Respondents immediately contacted the City to discuss the City's concerns. Respondents recall that a meeting was held on site to discuss a

breach of the erosion control with the City, and the City's concerns were immediately addressed.

In spite of the immediate response to the request of the City, the Director's Order followed.

**APPROPRIATE EROSION CONTROLS AND
CONTINUOUS MAINTENANCE AND REPAIR BY
PROFESSIONAL SUBCONTRACTOR**

9. Respondents deny that its erosion controls were inadequate, installed incorrectly, or were poorly maintained. As noted below, silt fences and berms have been replaced throughout the project, and Respondents have never been advised by Germantown or the State of Tennessee that the site's erosion controls were inadequate or improperly installed.

10. Silt fencing and stone berms at sediment traps have been repaired and/or replaced on multiple occasions without intercession by Germantown or the State of Tennessee. At all times material, Respondents have contracted with a professional erosion control subcontractor, Real Neat Erosion Control, to provide erosion control for the site. The sub's work is well known and appreciated by the State of Tennessee and Germantown as being professional and thorough.

11. The site has been watered constantly to keep dust and erosion to a minimum throughout all grading procedures. The site has been seeded as soon as grading operations have been completed, and berms have been erected to direct water flows to appropriate silt containment structures.

SPECIFIC RESPONSES TO DIRECTOR'S ORDER

1. Paragraph I is admitted.
2. Paragraph II is admitted.
3. Paragraph III is admitted.
4. It is admitted that the Commissioner of the Tennessee Department of Environment and Conservation has jurisdiction and may issue a Complaint and order corrective

action as set forth in paragraph IV. It is further admitted that the Commissioner has the authority to assess damages, to the extent damages can be proven.

5. It is admitted that Respondents are persons as defined in T.C.A. §69-3-103 (20), but denied that Respondents have violated the act as is alleged in paragraph V.

6. Paragraph VI is admitted.

7. Paragraph VII. is admitted.

8. Paragraph VIII

9. It is admitted that the initial application submitted by Respondents for Notice of Intent was initially deficient, but same was rectified immediately and accepted.

10. Paragraph X is admitted.

11. Paragraph XI is admitted.

12. Paragraph XII is admitted.

13. The allegations of paragraph XIII with respect to dust occurring during construction operations is admitted, but at all times material, the Respondents had water trucks operating full time, or whenever construction was taking place, in order to keep dust to a minimum. At no time did the City of Germantown or the State of Tennessee ever suggest erosion of silt or sand from the site was a problem before the Director's Order was issued.

14. Respondents are unable to respond to the allegations of paragraph XIV, as Respondents received no notice from the State of Tennessee or the City of Germantown in connection with the possible discharge of sediment into a wetland area. Respondents would note that between February 23rd and March 5th, 2007, several substantial rain events occurred. Respondents deny that the primary discharge was silt, and to the contrary, allege that the primary discharge that occurred from the site was sand, which should not have an adverse impact upon the stream channel, or the wetlands. The Certified Professional Wetland Scientist retained by the Respondents met on-site July 20, 2007, with a local representative of TDEC to discuss the

impact of this sand on the wetland and stream channel. They both agreed that attempting to remove the sand would very likely do more damage than good to the impacted wetland and stream. Furthermore, they agreed that it appears that this sand is being carried downstream and, ultimately, into the Wolf River after rain events. They agreed that the retained scientist will periodically monitor the wetland and channel to evaluate whether the sand continues to be carried downstream. The results of these investigations will be forwarded to the local office of TDEC.

15. Respondents deny the allegations of paragraph XV that erosion control measures were inadequate or had been poorly maintained. It is admitted that some sand was discharged following a heavy rain prior to the State's inspection. Respondents admit that the NOC for Construction Activities was not posted on site as required by the permit, but Respondents promptly alleviated that problem. The lack of NOC was a technical issue, and did not result in harm to the environment. Respondents would further note that the discharge permit was in place, and that all paperwork, other than the location of the NOC, was proper and in accord with regulations.

16. In regard to paragraph XVI, Respondents neither admit nor deny said allegation, as Respondents were not present during the time the determination was made.

17. Respondents were not present when the determination was made, so Respondents neither admit nor deny the allegations of paragraph XVII.

18. Respondents deny the assertion that in an April 2, 2007, follow up inspection, that site conditions had not improved. It is admitted that the silt fence on the eastern edge of the property had not been replaced, but Respondents assert that a silt fence was not necessary on the eastern edge. The eastern edge is bounded by a stream diversion channel, which leads directly to a borrow pit, in which there is no way for any sediment to leave the pit due to its size and

location. As such, appropriate erosion controls existed for the eastern edge of the property, and a silt fence was no longer needed.

Respondents would further show the “gullies” observed during the previous inspection were in fact sediment traps, and these traps had been dug out, expanded and widened since the March 12th inspection. It is appropriate that the “gullies” had increased in size, as that was the intent of the additional excavation. Excavation was performed to remove sand and silt, and to increase the capacity of the basins.

Respondents deny that the southern portion of the site was not being actively graded. At all times material, Respondents were actively working in areas within the designated portion. The Respondents deny that the receiving stream was being impaired by siltation as a result of a discharge. To the contrary, the Respondents submit that the primary discharge that occurred was sand, and not silt. According to a Certified Professional Wetland Scientist retained by the Respondents, neither the stream channel nor the wetlands have suffered long term damage as a result of this inadvertent discharge. The impact was minimal due to the permeable nature of the material, and the ability of plant and fauna to regenerate quickly in the areas where the sand was deposited. In addition, what sand is present is being washed downstream and, ultimately, into the Wolf River, after rain events. Also, it is quite obvious that vegetation is rapidly colonizing and stabilizing the impacted wetland and channel.

Respondents admit that a sediment detention basin is to be installed at outfalls that drain 5 or more acres to an impaired stream. However, Respondents submit that the sediment traps that were installed were in accord with current regulations, as the outfall at each location drains less than 5 acres. According to Respondents’ engineer, the erosion controls placed at the outfalls, and which were set forth in the SWPPP, were appropriately sized, designed and suitable for the erosion control plan for the site and the amount of water being drained. That the use of traps was in accord with the Department’s regulations.

Respondents would note that the traps have been improved by the addition of outlet control structures, but that said outlet control structures are not required under current regulations.

19. Paragraph XIX is denied.

20. Respondents deny that they violated any of said regulations and/or requirements as set forth in paragraphs XX, XXI, XXII.

RESPONSE TO DIRECTOR'S ORDER AND ASSESSMENT

21. Respondents assert that all requirements of paragraph XXIII have been complied with. Appropriate erosion prevention and sediment control measures designed by a professional engineer have been put into place to insure that no additional material leaves the site and enters waters of the State. The division has been notified in writing, and has been provided photographic documentation that the erosion prevention and sediment control measures have been installed. The documentation has been submitted to the Division of Water Pollution Control Manager at the Memphis Field Office, as well as the Manager of Enforcement and Compliance Section, Division of Water Pollution Control in Nashville.

22. No further work has been done pending inspection by the State. An on site review has been arranged, and a report has been provided to the Division which includes design considerations and rationale for selective techniques and control measures.

Respondents agree that they shall continue to maintain appropriate erosion prevention and sediment control measures to insure that no additional material leaves the site.

All other directives set forth in the Director's Order to be complied with at a future date shall be complied with.

WHEREFORE, AND FOR ALL OF WHICH, the Respondents appeal the Director's Order, and request that all fines be substantially reduced and/or dismissed.

Respectfully Submitted,



JAMES B. SUMMERS (#4721)

Allen, Summers, Simpson, Lillie & Gresham, PLLC

Attorneys for Respondents

80 Monroe Avenue, Suite 650

Memphis, Tennessee 38103

(901) 763-4200

CERTIFICATE OF SERVICE

I, James B. Summers, do hereby certify that a copy of the foregoing was forwarded, via U.S. Mail, postage prepaid, to the following:

TDEC

Memphis Environmental Field Office

Suite E-645, Perimeter Park

2510 Mt. Moriah Road

Memphis, TN 38115-1520

and

Paul E. Davis, Director

Division of Water Pollution Control

TN Dept. of Environment and Conservation

6th Floor L& C Annex

401 Church Street

Nashville, TN 37243-1534

This the 24th day of July, 2007



JAMES B. SUMMERS